Supreme Court, U.S.
FILED

No. 971922 MAY 28 1998

In the United States Supreme Court

OCTOBER TERM, 1997

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

-v.-

FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, UNITED STATES OF AMERICA,

Respondents,

UNITED TRANSPORTATION UNION, BROTHERHOOD OF SIGNALMEN and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Intervenors.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Whether the Court of Appeals erred in granting deference to a decision of the Federal Railroad Administration ("FRA") which contains no explanation of the rationale and factual basis for its determination that the Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of the Port Authority of New York and New Jersey, which operates a system of passenger cars which run on track that is not part of the general railroad system of transportation, in one of the largest urban areas of the United States, operates a "railroad" within the meaning of 49 U.S.C. 20102 that is subject to FRA jurisdiction.

STATEMENT PURSUANT TO RULES 14.1(b) AND 29.6

Parties to the Proceeding:

The parties to the proceeding are Petitioner, The Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary of the Port Authority of New York and New Jersey. The Respondents, the Federal Railroad Administration, The United States Department of Transportation and the United States of America. As intervenors in support of the respondents, the United Transportation Union, Brotherhood of Signalmen and Brotherhood of Locomotive Engineers.

Parent Companies:

The Port Authority Trans-Hudson Corporation ("PATH") is a wholly-owned subsidiary of the Port Authority of New York and New Jersey. The Port Authority is a bi-State agency created in 1921 by Interstate Compact which received Congressional consent. It was created to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Secs. 6401-23; N.J.S.A. Secs. 32:1-1-24. Pursuant to the Compact, and subsequently enacted bi-State legislation, the Port Authority owns and operates thirty-five public facilities in the Port District. The Port Authority has two subsidiaries. Respondent, PATH, a wholly-owned subsidiary, which owns and operates the PATH, an interurban electric rapid transit system between New York and New Jersey, and the Newark Legal and Communications Center Urban Renewal Corporation, which owns and operates an office building in Newark, New Jersey.

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Statutory and Regulatory Provisions Involved 2

Statement 4

Reasons for Granting the Writ 6

Conclusion 14

APPENDIX

Appendix A—Decision of the Federal Railroad Administration dated December 24, 1996 ..... A1

Appendix B—Judgment and Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit Filed December 15, 1997 ..... A4

Appendix C—Order of the United States Court of Appeals for the District of Columbia Circuit Denying Rehearing Filed February 27, 1998 ..... A7

TABLE OF AUTHORITIES

Page

Cases Cited:

Bowen v. American Hospital Association, 476 U.S. 610 (1986) 7

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 7, 8

Chicago Transit Authority v. Flohr, 570 F.2d 1305 (7th Cir. 1977) 6, 10, 12

Dickson v. Secretary of Defense, 68 F.3d. 1396 (D.C. Cir. 1995) 7

Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983) 7

Statutes Cited:

28 U.S.C. 1254(1) 2

45 U.S.C. 1104(4) 12

49 U.S.C. 20102 ..... 2, 5, 7, 8, 10

H. R. Rep. 97-571 ..... 7, 10

Pub. L. No. 97-468, Sec. 702, 96 Stat 2580 12

Pub. L. No. 97-35, 95 Stat. 357 12

Pub. L. No. 97-468, Sec. 702(c), 96 Stat. 2543 7

Pub. L. No. 100-342 Sec. 7(a), 102 Stat. 624 12

TABLE OF AUTHORITIES

Page

Regulations Cited:

49 C.F.R. 223.3..... 3, 4

49 Fed. Reg. 24286 (June 12, 1984) 4

No.

In the United States Supreme Court

OCTOBER TERM, 1997

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

-v.-

FEDERAL RAILROAD ADMINISTRATION,
DEPARTMENT OF TRANSPORTATION,
UNITED STATES OF AMERICA,

Respondents,

UNITED TRANSPORTATION UNION,
BROTHERHOOD OF SIGNALMEN and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Intervenors.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of the Port Authority of New York New Jersey, petitions for a writ of certiorari to review the judgment of judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., *infra*, 5) is unreported (See Table at 132 F.3d 1482; 1997 WL 812448 (D.C. Cir. 1997)). The decision of the Federal Railroad Administration is included in the Appendix to this Petition (Pet. App., *infra*, 1).

JURISDICTION

The opinion and judgment was issued by the Court of Appeals on December 17, 1998. A timely petition for review was denied on February 27, 1998 (Pet. App., *infra*, 7). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

49 U.S.C. 20102 provides:

(1) "railroad" -

> (A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including -
>
> > (i) commuter or other short-haul railroad passenger service in a metropolitan area or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and
> >
> > (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems

use new technologies not associated with traditional railroads; but

(B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(2) "railroad carrier" means a person providing railroad transportation.

49 C.F.R. 223.3 provides:

(a) This part applies to railroads that operate rolling equipment on standard gauge track that is a part of the general railroad system of transportation.

(b) this part does not apply to -

(1) Locomotives, cabooses, and passenger cars that operate only on track inside an installation that is not part of the general railroad system of transportation;

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

(3) Locomotives, passenger cars and cabooses that are historical or antiquated equipment and are used only for excursion, educational, recreational purposes or private transportation purpose.

(4) Locomotives that are used exclusively in designated service as defined in [Sec.] 223.5(m).

STATEMENT

The "Port Authority Trans-Hudson Corp[oration] (PATH) operates a 13.8-mile-long nonhighway ground transportation system connecting New York and New Jersey" (Pet. App. 5). By letter dated November 7, 1995, PATH requested that the FRA "recognize PATH as being an inter-urban rapid transit system not subject to FRA regulations." (App. 68). Those regulations establish that "rapid transit operations that are not connected to the general railroad system of transportation" are exempt from FRA jurisdiction. 49 C.F.R. 223.3(b)(2). PATH supported its request with detailed operational information set forth in two prior letters to the FRA by which PATH sought waivers from application to PATH of certain FRA rules (App. 12, 35). Specifically, PATH noted that it operated a closed system free from interconnections with other railroads and that the major historical reason the ICC withheld from PATH, in 1961, an exemption from regulation as an "interurban electric railway" - a joint service agreement with PATH's predecessor and the Pennsylvania Railroad Company -- no longer existed (App. 14, 38). The Administrative Record before the FRA leaves undisputed the fact that PATH is "not connected with the general railroad system of transportation" ((App. 8; PATH is "physically separate from the general system [of rail transportation]"(49 Fed. Reg. 24286 (June 12, 1984)). PATH does not interchange car equipment with any other transit system or railroad, nor does PATH engage in any joint service or operating agreement with another railroad (App. 35-38)[1].

The Administrative Record also indicates that the FRA, in considering PATH's request for a jurisdictional ruling, carefully catalogued PATH's operational characteristics (App.

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1 "App." refers to the Appendix For Petitioner filed by PATH in the Court of Appeals which contains documents considered by the agency in rendering its decision. "Pet. App." refers to the Appendix to this Petition.

185) "[i]n order to obtain a full understanding of PATH's operations so that [it] could apply the available legislative history, statutory provisions, and case law to the facts . . ." (App. 185, 187-190, 194-196, 220-21). Moreover, the FRA actually prepared a report outlining those characteristics and revised such report after a staff visit to PATH's facilities in April of 1996 *(Id.;* App. 193).

However, by letter from its Chief Counsel dated December 24, 1996, the FRA denied PATH's request for a determination that PATH was not subject to FRA jurisdiction. In so ruling, while citing the fact that it had inventoried PATH's physical and operating characteristics, the FRA, in a conclusory fashion, determined that "PATH has some physical and operating characteristics similar to rail rapid transit systems . . ." but that "in light of the nature of PATH's operations, your letters and supporting materials provide no persuasive rationale for rescinding FRA's determination that PATH is a railroad carrier within the meaning of 49 U.S.C. 20102 generally" (Pet. App. 2). Finally noting that Congress had extended FRA jurisdiction to "commuter or other short-haul railroad passenger service operating in a metropolitan or suburban area . . .", the FRA concluded that "PATH is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction." (Pet. App. 3).

PATH filed a petition seeking review of the FRA's decision in the Court of Appeals for the District of Columbia Circuit. The Court of Appeals, by decision of December 15, 1997, denied that petition finding that "the proper classification of PATH is ambiguous" and therefore, the FRA did not "abuse its discretion in determining that PATH remained a railroad carrier within the meaning of 49 U.S.C. 20102." PATH filed a timely petition for rehearing which was denied by the Court of Appeals on February 27, 1998 (Pet. App. 7)

REASONS FOR GRANTING THE WRIT

Review by this Court is warranted in this case because the Court of Appeals' reliance on familiar deference principles to affirm the FRA's decision was totally misplaced and violates a basic tenet of administrative law - in order to be entitled to deference from a reviewing court, an agency determination must articulate a satisfactory explanation for its action. While no doubt an agency is given some latitude in this area, the decision of the FRA contains no articulation of the reasons for its determination that PATH's operations were akin to those of a commuter railroad. Therefore, under long established administrative law principles honored by this Court, the FRA's decision is not entitled to such deference, nor could deference logically attach to its decision in the absence of such reasoning.

Further, the decision of the Court of Appeals upholding the FRA's determination is in conflict in principle with the decision of the Seventh Circuit which recognized that a rail system which, like PATH, operates on subway-type equipment on subway schedules is a rapid transit system which Congress deliberately excluded from FRA jurisdiction. *Chicago Transit Authority v. Flohr,* 570 F.2d 1305, 1307 (7th Cir. 1977). While since that decision, Congress has revisited the FRA's jurisdiction, in part to clarify that commuter railroads are subject to FRA jurisdiction, it has not disturbed the exclusion from FRA jurisdiction for rail rapid transit applied by the Court in *Flohr.*

1. The requirement that agency action not be arbitrary and capricious logically includes a requirement that the agency adequately explain its result. As this Court has indicated time and time again, "[i]t is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice

made.' *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))." *Bowen v. American Hospital Association*, 476 U.S. 610, 626 (1986). "[This Court's] recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it *the correlative responsibility of the agency to explain the rationale and factual basis for its decision*, even though [the Court will] show respect for the agency's judgment in both." Id. at 627, emphasis supplied. While "[t]his does not mean that an agency's decision must be a model of analytic precision to survive a challenge.", [as indicated] * * *" an agency's explanation must minimally contain "'a rational connection between the facts found and the choice made.'" *(Dickson v. Secretary of Defense*, 68 F.3d. 1396, 1404 (D.C. Cir. 1995), citation omitted)). In this case, the FRA in issuing a decision which contains only a conclusory statement that PATH's "is among the types of railroads" that lie within its jurisdiction, failed to honor its responsibility to provide some reasoned basis for its determination.

Congress clearly placed within FRA jurisdiction "commuter or other short-haul railroad passenger service in a metropolitan or suburban area ..." 49 U.S.C. 20102(1)(A)(i). Moreover, Congress broadly defined "railroad" to include "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways ..." At the same time, Congress plainly carved out from the definition of "railroad", and therefore from FRA jurisdiction, those "rapid transit operations in an urban area that are not connected to the general railroad system of transportation." 49 U.S.C. 20102(1)(B). (Pub. L. No. 97-468, Sec. 702(c), 96 Stat. 2543, 2580 (H.R. Rep. 97-571, pt. 1, at 17, reprinted at 1982 U.S. Code Cong. & Admin. News at 4499; "Section 102 would not extend

FRSA jurisdiction to rail rapid transit operations."). Faced with the decision as to whether PATH's operations were those of a "railroad" or rather, those of "rapid transit", the FRA's determination is fatally flawed because while acknowledging that PATH presents "'a somewhat unique case'" and that "PATH has some physical and operating characteristics similar to rail rapid transit systems", it simply concludes that *"[w]e believe that PATH is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction"* (Pet. App. 3, emphasis supplied). There is no identification of those characteristics of PATH the FRA determined were akin to those of a "rapid transit system" and those which it believed were more akin to the "types of railroads" which Congress intended to be subject to its jurisdiction. In fact, the decision of the FRA contains absolutely no articulation of the appropriate standards for determining whether a ground transportation system is a "rapid transit" operation or a commuter or other short-haul railroad. Such failure to "articulate any rational connection between the facts found and the choice made" *(Burlington Truck Lines, Inc. v. United States,* 371 U.S. at 168)), we submit, standing alone, means that contrary to the court of appeals' determination, the FRA's decision fails to pass muster under long-standing guidelines for administrative action set forth by this Court and, therefore, warrants review by this Court.

The Court of Appeals rejected PATH's challenge to the Federal Railroad Administration's assertion of jurisdiction over the transit service operated by PATH. In so doing, the Court held that because PATH shares characteristics of both "'rapid transit operations' and 'commuter or other short-haul railroad passenger service', the proper classification of PATH is ambiguous, and the FRA did not abuse its discretion in determining that PATH remained a railroad carrier within the meaning of 49 U.S.C. 20102" (Pet. App. 6). We submit, however, that contrary to the Court of Appeals' decision, it is

impossible to determine from a reading of the administrative decision where the ambiguity in PATH's status lies simply because, as noted, the FRA does not discuss those characteristics.

In fact, the Record before the agency conclusively demonstrates that the classification of PATH is not ambiguous and that the operational characteristics of PATH point in only one direction -- that it is a "rapid transit" service and not a commuter "railroad." PATH's operations have no interconnection of physical facilities with any railroad; PATH does not interchange equipment or personnel with other railroads nor does PATH share with another railroad entity a unity of financial and fiscal functions (App. 11, 13, 35-38). Moreover, PATH's electrical subway-type equipment is operated on subway-type schedules.[2]

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2 FRA's inventory of PATH's physical and operating characteristics revealed the characteristics of rapid transit. In answer to the question from the FRA as to whether PATH's trackage is distinguishable from traditional railroads, the FRA determined that indeed they were (App. 185, 195). (PATH utilizes "smaller ties" ... and "block ties set in concrete"; "all switches are guarded with (with guard rails)" and "some curves are guarded") (App. 195). It also determined that "PATH MU cars differ from traditional commuter rail MU cars" in several respects (App. 195). Most significantly, the FRA confirmed its prior determination (App. 183) that the maximum authorized speed of the system cars was 55 mph (App. 190, 196; "The maximum authorized speed on Boston subways is 50mph. The maximum authorized speed on NYC subways is 55 mph"). Also PATH MU cars are 20 to 30 feet shorter in length than commuter rail cars and have wheels with a smaller circumference than commuter rail MU cars (App. 189) ("PATH MU cars are only 53 feet from collision post to collision post. Commuter rail MU cars are 75 to 85 feet in length." "PATH MU cars have 28 inch wheels, commuter rail MU cars have 32 to 36 inch wheels").

FRA's investigation also revealed that PATH was a closed system that does to participate in any joint tariffs nor does it exchange tickets with other railroads or exchange equipment (App. 190).

2. Moreover, the decision of the Court of Appeals finding that the FRA did not abuse its discretion when it determined that PATH was a "railroad", we submit, is in conflict in principle with the decision of the Seventh Circuit in *Chicago Transit Authority v. Flohr, supra,* 570 F.2d at 1305. There the Seventh Circuit held that an urban mass transit system operated by the Chicago Transit Authority, which like the system operated by PATH, consisted of electrically self-powered units that were substantially smaller and lighter than railroad cars that did not use railroad rails, did not fall within the jurisdiction of the FRA. While Congress revisited the FRA's jurisdiction after that decision, in part, to clarify that commuter "railroads" fall within the FRA's statutory authority, Congress did not alter the statutory exclusion relied on by the Seventh Circuit in that case -- *"Congress clearly never intended the word 'railroad' as used in the Railroad Safety Act of 1970 to include urban rapid transportation."* 570 F.2d at 1309 (emphasis supplied); *See,* H.R. Rep. 97-571 *(supra).* Indeed, the entire premise of the statutory scheme in issue is that there is a distinct difference between rapid transit systems and railroads, even those railroads which commuters utilize. "[I]n both the mass transit industry and in the railroad industry, the term 'railroad' as it is commonly used, does not include rapid transit systems." *(Chicago Transit Authority v Flohr,* 570 F.2d at 1307, fn. omitted).

Facing a dearth of reasoning in its administrative decision, including no reference to the operational characteristics the FRA had so carefully examined in exploring PATH's request for a jurisdictional ruling, the FRA defended its decision in the Court below by arguing that Congress defined railroad very broadly in 1988 when it revised the applicable statute to include "any form[s] of non-highway ground transportation that runs on rails or electromagnetic guideways . . ." (quoting, 49 U.S.C. 20102), and that this definition included commuter transportation passenger service as defined and clarified by

Congress in 1982 as being incorporated into FRA jurisdiction. Therefore, the FRA contended, the type of equipment utilized by a rail system did not matter.[3] Also irrelevant was the fact that PATH demonstrated that it was no longer connected to a general railroad system of transportation (Govt. Appellate Br. at 20). The key factor, according to the FRA, was the fact that PATH by its own admission, continued to provide commuter passenger service (Id. at 27-28). The government's argument proves too much. Urban rapid transit systems, including city subways, "run on rails" and many carry "commuters" as the bulk of their customers, but they are not subject to the FRA's safety jurisdiction as they are acknowledged to be rapid transit systems, not railroads.[4] As recognized by the Seventh Circuit in *Flohr,* the important point in determining whether FRA has safety jurisdiction is the fact that "the risks, hazards, technology, and operating procedures of . . . an urban transit

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3 Despite the FRA's *post hoc* argument that operational characteristics are irrelevant, as noted in the Statement, the FRA in its administrative proceedings carefully catalogued PATH's operational characteristics, in order to make its determination. However, as also noted, it engaged in no analysis of those conditions in its decision.

4 For example, the Record contains a Report by a highly respected Transportation study group, the Transportation Research Board which was issued in November 12-15, 1995 as Conference Proceedings sponsored by the Transportation Research Board and the American Public Transit Association. The Report on Light Rail Transit indicates that nationally, there are several "nonrailroads" that are engaged in interstate transportation of passengers: "Washington Metropolitan Area Transportation Authority (WMATA), connecting Maryland and Virginia with the District of Columbia, and Bi-State Metro Link, connecting East St. Louis, Illinois, with St. Louis, Missouri" as well as the Port Authority Transit Corporation operated by the Delaware River Port Authority. That same report noted that "[t]he conditions that led to the ICC's classifying the Hudson and Manhattan (PATH's predecessor) as a railroad no longer exist, yet the [Port Authority] has not applied to reclassify the transit line operated by PATH." That request, made in the same month the report was issued, is, of course, the subject of this case.

system, are far different from those involved in railroad operations, the considerations involved in formulating safety standards are also far different." 570 F.2d 1305. Although Congress has revisited the safety jurisdiction of the FRA several times since *Flohr* (Pub. L. No. 97-468, Sec. 702, 96 Stat 2580; Pub. L. No. 100-342, Sec. 7(a), 102 Stat. 624, 628), it has continued to exclude from FRA jurisdiction rapid transit systems.

In fact, PATH plainly does not fall within the statutory definition of "commuter service" which was defined by Congress in the Northeast Rail Services Act of 1981 as "short-haul rail passenger service operated in a metropolitan and suburban area, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations." Pub. L. No. 97-35, 95 Stat. 357, 646, codified at 45 U.S.C. 1104(4). It is undisputed that PATH does not offer reduced fare, multiple-ride or commutation tickets but rather, one flat $1.00 fare per ride for all trips taken twenty-four hours a day. Once more, however, there is absolutely no mention, much less analysis, in the FRA's decision of whether PATH operates a commuter service within the meaning of these provisions.

3. In its decision, the Court of Appeals noted that PATH "has been regulated as a railroad for decades" a factor which obviously greatly influenced the FRA (Pet. App. 5). In fact, in its final decision, the FRA also placed much emphasis on the fact that PATH had made no filing [presumably seeking an exemption] in the rulemaking proceedings in 1985 concerning FRA rules on Alcohol and Drug Use in Railroad Operations (App. 230). However, we submit that a determination of PATH's present status should not be based on some vague theory of jurisdictional estoppel or maintenance of the status quo. PATH's failure to request a jurisdictional ruling from the

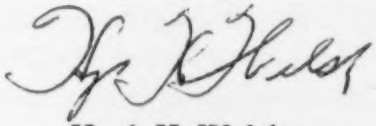
agency on its status until the present request should not be determinative of that status which is independently and objectively verifiable. That is especially the case, when, as here, it was acknowledged by the FRA that PATH has sought and been granted numerous waivers from certain safety requirements through the years at which time the FRA recognized PATH's operations as being rapid transit in nature (App. 4, 33, 49, 211-12), and when PATH has demonstrated that over time its operational characteristics had indeed changed (App. 162-63).

Since there is a real difference, as codified in the statutory framework, between urban rapid transit systems and railroads, including a commuter railroad, it was incumbent on the FRA, in its final determination, to isolate those characteristics and determine whether PATH was an urban rapid transit system or a railroad. As we have shown, it did not do so stating only, in a conclusory fashion, that "[w]e believe that PATH is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction." (Pet. App. 3). Accordingly, this Court should grant this petition. In view of the fact that the administrative decision contains no meaningful explanation of the agency's conclusion that PATH is a railroad within the meaning of the statute, the Court may wish to consider summary reversal and remand of this case to the Court of Appeals for further remand of this matter to the FRA.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,



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May 27, 1998

APPENDIX A

Decision of the Federal Railroad Administration dated December 24, 1996

US Department
Of Transportation

400 Seventh St. S.W.
Washington, D.C. 20590

Federal Railroad
Administration

Dec. 24, 1996

Hugh H. Welsh, Esq.
Deputy General Counsel
The Port Authority of NY & NJ
One World Trade Center
New York, N.Y. 10048

Dear Mr. Welsh:

I write in response to your letters dated August 9 and October 24, requesting that the Federal Railroad Administration (FRA) release the Port Authority Trans-Hudson Corporation (PATH) from FRA jurisdiction, and referencing previous correspondence and meetings with members of my staff. Specifically, you state that since PATH's operations are more like those of a rapid transit system than a conventional railroad, FRA should no longer assert jurisdiction over PATH. You then indicate that PATH should instead be subject to regulation by the Federal Transit Administration.

In response to your jurisdictional concerns, we carefully analyzed all of the factual and legal arguments presented in your submissions to FRA (including correspondence

regarding Waiver Petition Docket Nos. LI-94-1 and PB-94-2), and asked FRA's Regional Office in Cambridge, Massachusetts to inventory PATH's physical and operating characteristics. We were especially interested in determining whether there has been any factually significant change in circumstances on the PATH system since 1985. As you will recall, in the preamble to the final rule in FRA Docket No. RSOR-6, Notice No. 7, Control of Alcohol and Drug Use in Railroad Operations (50 FR 31508, August 2, 1985), FRA noted that PATH was "a somewhat unique case" and had asked for comments in the Notice of Proposed Rulemaking. However, PATH made no filing in that proceeding, and FRA noted that despite "characteristics that might warrant its exclusion from other Federal requirements, with respect to the control of alcohol and drug abuse it faces the same issues and accident potential that affect other short-haul passenger operators, [and] the rule has been crafted specifically to include PATH." Moreover, on page 4 of your "Petition for Partial Waiver from the Requirements of 49 CFR §232.13(c)(1). Relating to Intermediate Terminal Train Air Brake Tests," dated April 1, 1994, you concede that "PATH serves primarily short-haul commuters."

FRA accepts that PATH has some physical and operating characteristics similar to rail rapid transit systems that are not connected to the general railroad system of transportation, and acknowledges that PATH recently removed two switches from its line which formerly connected PATH's westbound mainline track G to track owned by the National Railroad Passenger Corporation (Amtrak). However, in light of the nature of PATH's operations, your letters and supporting materials provide no persuasive rationale for rescinding FRA's determination that PATH is a railroad carrier within the meaning of 49 U.S.C. §20102 generally. As you are aware, that provision applies to, among others, "commuter or other short-haul railroad passenger service in a metropolitan or

suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979." See 49 U.S.C. §20102(1)(A)(i). We believe that PATH is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction. We have given your request every consideration, but conclude that we cannot grant the relief requested. Accordingly, we must deny that request.

Sincerely,

S. Mark Lindsey
Chief Counsel

cc: Lawrence M. Mann, Esq.

APPENDIX B

Judgment and Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit Filed December 15, 1997

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1103

Port Authority Trans-Hudson Corporation,

Petitioner

v.

Federal Railroad Administration,
United States Department of Transportation, and
United States of America,

Respondents

United Transportation Union
Brotherhood of Signalmen and
Brotherhood of Locomotive Engineers,

Intervenors

On Petition for Review of A Determination of the Federal Railroad Administration

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Before: GINSBURG, HENDERSON, AND TATEL, Circuit Judges.

JUDGMENT

This appeal was considered on the record from the Federal Railroad Administration and on the briefs filed by the parties. The court is satisfied that the appropriate disposition of this case does not call for a published opinion. *See*, D.C. Cir. Rules 34(j),36(b). For the reasons given in the attached memorandum, it is

ORDERED and ADJUDGED that the petition for review be denied.

Port Auth. Trans-Hudson Corp. V. Federal Railroad Admin., 97-1103

MEMORANDUM

Port Authority Trans-Hudson Corp. (PATH) operates a 13.8-mile-long nonhighway ground transportation system connecting New York and New Jersey. Although it has been regulated as a railroad for decades, PATH recently sought a declaration from the Federal Railroad Administration (FRA) that it does not fall within the FRA's jurisdiction because it is not a "railroad" as defined in 49 U.S.C. §20102.

The statute draws a distinction between "commuter or other short-haul railroad passenger service in a metropolitan or suburban area," over which the FRA has jurisdiction under subsection (1)(A)(I), and "rapid transit operations that are not connected to the general railroad system of transportation," over which it lacks jurisdiction under subsection (1)(B). PATH argues that because it no longer has any connections "to the general railroad system of transportation" it now comes

under the exception for rapid transit operations in subsection (1)(B). Although the "FRA accepts that PATH has some physical and operating characteristics similar to rail rapid transit systems that are not connected to the general railroad system of transportation," the FRA determined that PATH is a commuter service and therefore is "among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction." Letter from S. Mark Lindsey, Chief Counsel, FRA, to Hugh H. Welsh, Deputy General Counsel, PATH, December 24, 1996.

Because the PATH shares characteristics of both "rapid transit operations" and "commuter or other short-haul railroad passenger service," the proper classification of PATH is ambiguous, and the FRA did not abuse its discretion in determining that PATH remained a railroad carrier within the meaning of 49 U.S.C. §20102. Accordingly, we deny the petition for review.

The Clerk is directed to withhold the issuance of the mandate herein until seven days after disposition of any timely petition for rehearing, *See,* D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

APPENDIX C

Order of the United States Court of Appeals for the District of Columbia Circuit Denying Rehearing Filed February 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1103 September Term, 1997

Port Authority Trans-Hudson Corporation,

Petitioner

v.

Federal Railroad Administration,
United States Department of Transportation, and
United States of America,

Respondents

United Transportation Union
Brotherhood of Signalmen and
Brotherhood of Locomotive Engineers,

Intervenors

Before: Ginsburg, Henderson and Tatel, Circuit Judges.

ORDER

Upon consideration of petitioner's petition for rehearing filed January 29, 1998, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

FILED
AUG 5 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1922

In the Supreme Court of the United States

OCTOBER TERM, 1997

PORT AUTHORITY TRANS-HUDSON CORPORATION,
PETITIONER

v.

FEDERAL RAILROAD ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the determination of the Federal Railroad Administration that petitioner is a "railroad carrier" within the meaning of 49 U.S.C. 20102.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bowman Transp., Inc. v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974)	8
Chicago Transit Authority v. *Flohr*, 570 F.2d 1305 (7th Cir. 1977)	6
Hall v. *McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989)	8

Statutes and regulations:

Act of July 5, 1994, Pub. L. No. 103-272, § 1, 108 Stat. 745	3
Administrative Procedure Act, 5 U.S.C. 706	7
Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971:	
§ 202(a), 84 Stat. 971	1, 2
§ 208-210, 84 Stat. 974-976	2
Omnibus Budget Reconcilation Act of 1981 (Northeast Rail Service Act of 1981), Pub. L. No. 97-35, Tit. XI, Subtit. E, 95 Stat. 643:	
§ 1135(a)(3), 95 Stat. 646 (45 U.S.C. 1104(3))	3, 6, 7
§ 1135(a)(4), 95 Stat. 646 (45 U.S.C. 1104(4))	2, 6
Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 7(a), 102 Stat. 628	3
Rail Safety and Service Improvement Act of 1982, Pub. L. No. 97-468, § 702(c), 96 Stat. 2580	2, 7
49 U.S.C. 20102	4, 5, 8
49 U.S.C. 20102(1)(A)	3
49 U.S.C. 20102(1)(A)(i)	4
49 U.S.C. 20102(1)(B)	5, 7

Statute and regulation—Continued: Page

49 U.S.C. 20103 3
49 C.F.R. 223.3(b)(2) 3

Miscellaneous:

H.R. Rep. No. 571, 97th Cong., 2d Sess. (1982) 7
H.R. Rep. No. 180, 103d Cong., 1st Sess. (1993) 3

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A4-A6) is unpublished, but the decision is noted at 132 F.3d 1482 (Table). The decision of the Federal Railroad Administration (Pet. App. A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1997. A petition for rehearing was denied on February 27, 1998. Pet. App. A7. The petition for a writ of certiorari was filed on May 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Federal Railroad Safety Act of 1970 (Safety Act), Congress directed the Secretary of Transportation to assume regulatory authority over "all areas of railroad safety." Safety Act, Pub. L. No. 91-458, § 202(a), 84 Stat. 971. The Safety Act authorized the Secretary to issue regulations supplementing the safety laws already in effect and granted the Secretary broad inspection, injunctive, and penalty powers. *Id.*, §§ 202(a), 208-210, 84 Stat. 971, 974-976. The Secretary has delegated many of those powers to the Federal Railroad Administration (FRA), a subagency of the Department of Transportation.

In 1982, Congress amended the Safety Act to provide that the term "all areas of railroad safety" includes "the safety of commuter or other short-haul rail passenger service in a metropolitan or suburban area, including any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979." Rail Safety and Service Improvement Act of 1982 (1982 Act), Pub. L. No. 97-468, § 702(c), 96 Stat. 2580. In a separate context, Congress contemporaneously defined "[c]ommuter service" as "short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations." Northeast Rail Service Act of 1981 (NERSA), *enacted as* Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1135(a)(4), 95 Stat. 646 (codified at 45 U.S.C. 1104(4)). In that legislation, Congress specifically named "the Port

Authority Trans-Hudson Corporation"—the petitioner in this case—as a "[c]ommuter authority." *Id.*, § 1135(a)(3), 95 Stat. 646 (codified at 45 U.S.C. 1104(3)).

In the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 7(a), 102 Stat. 628, Congress clarified that, for purposes of the Secretary's regulatory authority over "every area of railroad safety," 49 U.S.C. 20103, the term "railroad" means "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways," including "commuter or other short-haul railroad service in a metropolitan or suburban area" and "high speed ground transportation systems that connect metropolitan areas." 49 U.S.C. 20102(1)(A).[1] Congress further provided, however, that the term "does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation." *Ibid.*; see also 49 C.F.R. 223.3(b)(2).

2. Petitioner, a wholly-owned subsidiary of the Port Authority of New York and New Jersey, operates a transportation system connecting New York City to northern New Jersey. Petitioner carries 199,000 passengers each day between those two locations. C.A. App. 13, 36. Since its formation in 1962, petitioner has been subject to federal railroad safety laws. In a November 1995 letter, however, petitioner asked the FRA to recognize it "as being an inter-urban rapid transit system not subject to FRA railroad regulations." *Id.* at 68-69. Petitioner based

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[1] In 1994, Congress recodified the federal railroad safety statutes and placed them in Title 49 of the United States Code. That recodification made no substantive change to those statutes. See Act of July 5, 1994, Pub. L. No. 103-272, § 1, 108 Stat. 745; H.R. Rep. No. 180, 103d Cong., 1st Sess. 1-5 (1993).

that request largely on the contention that it ran its operations on a "closed system" with no remaining connections to other railroads. *Id.* at 13-14, 37-38.

The FRA denied petitioner's request in a December 1996 letter. Pet. App. A1-A3. The FRA first observed that, in a 1985 rulemaking proceeding in which petitioner had declined to submit comments, the agency had determined that its safety jurisdiction extended to petitioner's operations. *Id.* at A2. The agency thus looked to see whether "there has been any factually significant change in circumstances on [petitioner's] system." *Ibid.* It found that petitioner has "some physical and operating characteristics" similar to those found in rapid rail transit systems. *Ibid.* Nonetheless, in a specific waiver request filed contemporaneously with petitioner's request for this jurisdictional ruling, petitioner itself had reaffirmed that it "serves primarily short-haul commuters." *Ibid.* The FRA concluded that, "in light of the nature of [its] operations," petitioner's operations remain within Section 20102's definition of "railroad," which specifically includes " 'commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979.' " *Id.* at A2-A3 (quoting 49 U.S.C. 20102(1)(A)(i)). For that reason, the agency found, petitioner "is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction." *Id.* at A3.

3. In an unpublished memorandum opinion, the court of appeals unanimously affirmed. Pet. App. A4-A6. The court found that petitioner "shares characteristics of both 'rapid transit operations' and 'commuter or other short-haul railroad passenger

service,'" and that "the proper classification of [petitioner] is ambiguous." *Id.* at A6. In those circumstances, the court concluded, the FRA acted reasonably in finding that petitioner "is a commuter service and therefore is 'among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction.'" *Ibid.*

DISCUSSION

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner argues that its operations should be classified as "rapid transit operations," which are not subject to the FRA's safety jurisdiction, rather than as "commuter or other short-haul railroad passenger service," which is subject to that jurisdiction. See 49 U.S.C. 20102. That factbound claim is without merit. Even though petitioner's operations do present "a somewhat unique case" (Pet. App. A2), petitioner continues to serve, by its own admission, "primarily short-haul commuters." *Ibid.* That admission forecloses petitioner's claim here, because Section 20102 places commuter services squarely within the scope of the FRA's jurisdiction. Indeed, such services fall within that jurisdiction whether or not the facilities in question are "connected to the general railroad system of transportation," 49 U.S.C. 20102(1)(B), despite petitioner's apparent assumption to the contrary (Pet. 9). Whether or not facilities are connected to the general railroad system is relevant only for determining whether services that *are* properly characterized as "rapid transit operations"

(as these are not) nonetheless fall within the FRA's jurisdiction.

Petitioner argues (Pet. 11) that reliance on the commuter-oriented character of its operations "proves too much" because many "rapid transit systems" carry commuters as well. Before the agency, however, petitioner acknowledged not just that it carries short-haul commuters, but that such carriage is its "primar[y]" function. Pet. App. A2. That concession is critical. Unlike the New York City subway system and other rapid transit systems, petitioner does not generally transport non-commuting passengers between points within a single urban area; instead, petitioner's overriding purpose is to transport commuters between New York City and New Jersey. See C.A. App. 36, 45.[2] Also unavailing is petitioner's claim (Pet. 12) that it does not have some of the characteristics that NERSA identifies as "usually" associated with "commuter services." See pp. 2-3, *supra* (discussing NERSA). Petitioner does not deny having other characteristics that NERSA does identify with such services, such as "morning and evening peak period operations." 45 U.S.C. 1104(4). Indeed, NERSA itself identifies petitioner *by name* as a "[c]ommuter authority." 45 U.S.C. 1104(3).

There is also no merit to petitioner's argument (Pet. 6, 10) that the decision below conflicts "in principle" with *Chicago Transit Authority* v. *Flohr*, 570 F.2d 1305 (7th Cir. 1977). That decision held that the

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[2] Moreover, petitioner provides no basis for the contention that "many" urban rapid transit systems outside the FRA's jurisdiction "carry 'commuters' as the *bulk* of their customers." Pet. 11 (emphasis added). In particular, as characterized by petitioner itself, the study group findings on which petitioner relies (see Pet. 11 n.4) do not support that proposition.

FRA's jurisdiction does not extend to "rapid transit operations," an issue not presented or disputed here. In subsequent legislation, Congress responded to *Flohr* by providing that the FRA's safety jurisdiction over "railroads" extends to "commuter or other short-haul railroad passenger service in a metropolitan or suburban area," 1982 Act, § 702(c), 96 Stat. 2580; see H. R. Rep. No. 571, 97th Cong., 2d Sess. 41 (1982), but does not extend to "rapid transit operations in an urban area that are not connected to the general railroad system of transportation," 49 U.S.C. 20102(1)(B). In part because *Flohr* predated that legislation, it does not address how to draw the distinction between those two statutory categories. In any event, even apart from those intervening changes in law, the *Flohr* court's determination that the Chicago system is a "rapid transit system" beyond the FRA's jurisdiction does not support the proposition that the quite different system at issue here falls within such a category as well. Indeed, NERSA's identification of petitioner as a "[c]ommuter authority" (45 U.S.C. 1104(3)) suggests precisely the opposite conclusion.

2. Petitioner also claims that the FRA's December 1996 letter violates the requirement, derived from the Administrative Procedure Act, 5 U.S.C. 706, "that [an] agency adequately explain its result." Pet. 6. The court of appeals did not address that claim, presumably because petitioner did not clearly develop it in that court; instead, petitioner argued principally that the FRA's decision was substantively invalid and unsupported by the factual record. See, *e.g.*, Port Auth. C.A. Br. 6-14. But even if petitioner had adequately preserved the claim, the FRA did in fact meet

its obligation to provide a reasoned explanation for its decision.

As the FRA observed in its December 1996 letter, it has long treated petitioner as a commuter carrier subject to federal safety regulation, a status reaffirmed in a 1985 rulemaking proceeding in which petitioner declined to submit comments. Pet. App. A2. The agency further noted that, despite certain mechanical changes in petitioner's operations, petitioner itself has conceded that it continues to "serve[] primarily short-haul commuters." *Ibid.* As discussed, that observation alone justifies the FRA's decision because, the agency emphasized, federal safety jurisdiction under Section 20102 "applies to, among others, 'commuter or other short-haul railroad passenger service in a metropolitan or suburban area.'" Pet. App. A2-A3.

Although "[d]ivergence from agency precedent demands an explanation," when an agency is merely applying prior agency policy in a consistent manner, "the agency's explanation need not be elaborate." *Hall* v. *McLaughlin*, 864 F.2d 868, 872-873 (D.C. Cir. 1989). Moreover, a reviewing court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The FRA's letter here—reaffirming the agency's long-standing exercise of jurisdiction over operations that, by petitioner's own concession, remain commuter-oriented—amply meets those standards.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-1922

In the United States Supreme Court

OCTOBER TERM, 1997

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

-v.-

FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, UNITED STATES OF AMERICA,

Respondents,

UNITED TRANSPORTATION UNION, BROTHERHOOD OF SIGNALMEN and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Intervenors.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS*

Page

Table of Authorities ii

Reply Brief 1

Conclusion 7

---

* A Statement pursuant to Rules 14.1(b) and 29.6 of the Rules of this Court is included in the petition filed by PATH.

TABLE OF AUTHORITIES

Page

Cases Cited:

SEC v. Chenery Corp. 332 U.S. 194 (1947)..... 6

Bowen v. Georgetown University Hosp., 488 U.S. 204 (1988)..... 6

Felton v. Southeastern Pennsylvania Transp. Auth., 952 F.2d 59 (3rd Cir. 1991)..... fn.2

Chicago Transit Authority v. Flohr, 570 F.2d 1305 (7th Cir. 1977) 3, 5, 6, fn.3

Statutes Cited:

49 U.S.C. 20102(1)(A)(i)..... 2

49 U.S.C. 20102(1)(B)..... 4

Northeast Rail Service Act of 1981 (NERSA), Pub. L. No. 97-35, Sec. 1135(a)(4), 95 Stat. 646, codified at 45 U.S.C. 1104(4) fn.2

Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, Sec. 3029, 105 Stat. 2117, codified at 49 U.S.C. 5330(f) 2

Regulations Cited:

49 C.F.R. 659.5..... 2

No. 97-1922

In the United States Supreme Court

OCTOBER TERM, 1997

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-v.-

FEDERAL RAILROAD ADMINISTRATION,
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UNITED STATES OF AMERICA,

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BROTHERHOOD OF SIGNALMEN and
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**ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In its petition, PATH argued that in view of the FRA's failure to 1) isolate the statutory characteristics that make an urban rapid transit system (outside of FRA jurisdiction)

different from a "commuter or other short-haul railroad passenger service" (subject to FRA jurisdiction), and 2) apply those characteristics to PATH, the FRA had abdicated its responsibility to provide a reasoned basis for its demonstrably incorrect decision that PATH was a "railroad" within FRA jurisdiction. Accordingly, summary reversal and remand of this case to the Court of Appeals for further remand to the FRA would be appropriate.

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, Sec. 3029, 105 Stat. 2117, codified at 49 U.S.C. 5330(f), required the Federal Transit Administration (FTA) to issue regulations creating a state oversight program for "rail fixed guideway systems" which has been defined by the FTA to include "heavy or rapid rail systems". 49 C.F.R. 659.5 (App. 213). PATH alone, among rapid transit systems, continues to be the focus of FRA's assertion of jurisdiction, all others being subject to the FTA.

The government, obviously faced with a lack of rationale in the FRA's letter decision to support the agency's determination that PATH "is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction" (Pet. App. 3), only half-heartedly offers any support for the FRA's letter decision from the four corners of that document (Br. in Op. at 8). Instead, the FRA now contends that unlike other rapid transit systems which also carry commuters, simply because PATH once stated (App. 14, 163), in a different context, that it "serves primarily short-haul commuters", its operations are those Congress had in mind when it indicated that railroads within the FRA's jurisdiction included "commuter" railroads (49 U.S.C. 20102(1)(A)(i)).

The FRA's almost exclusive reliance in its Brief (at 5-6, 8) on PATH's statement that its system transports "primarily

short-haul commuters" (Pet. A.2) takes convenient and strained advantage of the statutory terms including in FRA jurisdiction a "commuter. . .service", but hardly proves its point. In fact, the government is misleading in its assertion, not repeated in the FRA's decision, that this "observation *alone* justifies the FRA's decision" (Br. in Op. at 8, emphasis supplied), for it certainly does not. As PATH noted in its petition, other rail systems transport commuters between the various States as a major component of their service — the Washington area "Metro" service operating between Washington, D.C. and suburban Virginia and Maryland is but one familiar example (Pet. n.4, App. 83)[1] — yet these systems have been acknowledged to be nonrailroad rapid transit operations. The simple fact is that the percentage of commuter patrons on a transit system was not articulated by the FRA in this determination, or in this Record, as the sole jurisdictional criteria. Leaving aside the dearth of rationale in the FRA's determination as a whole, this absence is not surprising because as stated by the Seventh Circuit in *Chicago Transit Authority v. Flohr,* 570 F.2d 1305, 1307 (7th Cir. 1977), in determining whether the FRA has safety jurisdiction, important factors are "the risks, hazards, technology, and operating procedures of. . .an urban transit

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1 The government takes PATH to task for stating in its petition that many urban transit systems carry commuters as the "bulk" of their customers as unsupported (Br. in Op. at 6, n.2). Actually, the study group findings of the Transportation Research Board summarized in PATH's Petition (at 11, n.4), indicate that "[s]everal other nonrailroads are engaged in interstate transportation of passengers: Washington Metropolitan Area Transportation Authority (WMATA). . .Bi-State Metro Link, connecting East St. Louis, Illinois, with St. Louis Missouri" and Port Authority Transit Corporation operated by the Delaware River Port Authority, the later of which the study concluded "had clearly demonstrated how an interstate rail transit line could be ruled to be a nonrailroad" (App. 83). It is certainly logical to conclude that such "nonrailroad" "transit line[s]" which operate between States are carrying commuters as the bulk of their service.

system [which are] far different from those involved in railroad operations. . ." In fact, PATH's physical and operating characteristics were the factors inventoried by the FRA in its administrative investigation of PATH (Pet. 9, n.2) and yet, but for an acknowledgment that the inventory was made (Pet. A 1-2), not analyzed in agency's final letter decision.[2]

Under the statutory scheme, only rapid transit operations "that are not connected to the general railroad system of transportation" plainly fall outside the FRA's definition of "railroad". 49 U.S.C. 20102(1)(B). Significantly, the government does not take issue with the fact that Record evidence demonstrates no such connections for PATH. The FRA does apparently make the point that "commuter railroads", with or without such connections, are within FRA jurisdiction (Br. in Op. at 5). This is certainly true, however, they once more offer no support for the FRA's determination that PATH is a "commuter" railroad other than PATH's characterization of its customer base. The FRA states that PATH apparently assumes incorrectly that the lack of such railroad connections is determinative of its jurisdictional argument. Actually, it is the FRA which would ignore the fact that PATH, in addition to showing that its facilities were not connected to the general railroad system, also presented

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2 The government also notes that the Northeast Rail Service Act of 1981 (NERSA), Pub. L. No. 97-35, Sec. 1135(a)(4), 95 Stat. 646, codified at 45 U.S.C. 1104(4) identified PATH as a "[c]ommuter authority". Actually, in requiring that Conrail divest itself of such services by January 1, 1983, NERSA authorized the transfer by Conrail of its regional and interstate commuter rail service to a number of "local transit authorities" *(Felton v. Southeastern Pennsylvania Transp. Auth.*, 952 F.2d 59, 62 (3rd Cir. 1991), including PATH. However, there is no indication in the Record that PATH actually acquired such lines or now runs such lines. In any event, commuter authorities which acquired such commuter lines did not thereby subject their separate transit operations to statutes and regulations governing commuter railroads. *Id.* at 63.

physical and operational characteristics demonstrating that it operated "rapid transit" within the meaning of the statute (Pet. 9, n.2) and that such characteristics, including, but not limited to, its lack of railroad connections, are relevant to determining whether it operates nonrailroad "rapid transit". The FRA was challenged to distinguish PATH from acknowledged rapid transit systems and failed to do so.

Finally, the government argues that there is no conflict, even in principle, between the FRA's decision in this case and the Seventh Circuit's decision in *Chicago Transit Authority v. Flohr,* 570 F.2d at 1305 which held that FRA jurisdiction does not extend to "rapid transit operations" (Br. in Op. at 6-7) Their distinction of *Flohr,* we submit, misses the point. First, the government is correct when its states that "because *Flohr* predated [1982 Congressional legislation clarifying that FRA jurisdiction extends to "commuter" railroads and excludes "rapid transit operations"], it does not address *how to draw the distinction* between those two statutory categories." (Br. In Op. at 7, emphasis supplied). Since the definition of commuter railroad at issue in this litigation, albeit a legislative clarification, came after *Flohr,* the decision could not have addressed those two statutory categories in the exact manner now before this Court. However, the important point, and one not addressed by the FRA's brief in this Court, is that the Court in *Flohr* did address the issue of what it means to be a "rapid transit operation" and what it meant to be a "railroad" and determined that the Chicago Transit Authority, which like PATH, consisted of electrically self-powered units that were substantially smaller and lighter than railroad cars that did not use the rails of any railroad, did not fall within the FRA's railroad jurisdiction. 570 F.2d at 1307.[3] While, after *Flohr,*

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3 No support is offered by the government for its statement that PATH is a "quite different system" (Br. in Op. at 7) than the Chicago system at issue in *Flohr.* The decision of the FRA certainly provides no support for this statement, and the Record compiled by the FRA

Congress clarified that some railroads, namely "commuter" railroads fell within FRA's statutory authority, it has not to this day altered the definition of rapid transit operation applied by the Court in *Flohr.*

Consequently, there is undoubtedly a *distinction to be drawn* between the two statutory categories at issue here and one which the FRA is charged with drawing. However, in this case, the FRA did not address the absolutely critical point of how it draws a distinction between commuter railroad operations in metropolitan areas and rapid transit which serves commuters in those same areas, much less provide a reasoned basis for its application of such distinction to PATH.

This is a case in which Congress has set forth the two fairly broad definitions of "rapid transit" and "railroad" (including "commuter . . . service) to guide the agency in making these jurisdictional determinations. It was incumbent on the agency to "fill in the interstices of the Act" *(Bowen v. Georgetown University Hosp.,* 488 U.S. 204, 219 (1988) (Scalia, J. concurring), *quoting, SEC v. Chenery Corp.* 332 U.S. 194, 202 (1947)) and decide this case in accordance with those statutory guidelines. The FRA did not do so, falling back instead on PATH's unidentified "unique" characteristics and PATH's failure to request a jurisdictional ruling until the present case, both poor substitutes for rational decision-making. [4]

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investigation indicates that the two systems have similar key operating and physical characteristics (Pet. 9, n.2).

4 When it turns to the FRA's decision, the government argues that since it had long treated PATH as falling within its jurisdiction, the agency's rationale need not be elaborate if reasonably discernable (Br. in Op. at 8). As we noted in our petition (at 13), PATH sought and was granted waivers from FRA requirements in the past based upon PATH's operations being rapid transit in nature. PATH's failure to request an

CONCLUSION

For these reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 21, 1998

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overall jurisdictional determination prior to this time, therefore, could not and should not deprive it of its right to a reasoned decision in this proceeding. Moreover, as already noted, the FRA, in its administrative investigation, laid the ground work for a determination of PATH's status by performing an inventory of its physical and operational characteristics and PATH's current status. Yet, its final letter determination is silent on any analysis of this endeavor.